Supreme Court, U.S.
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No. 00-135

In The

Supreme Court of the United States

KEELEY TATSUYO HUNTER, a minor, by GINA F. BRANDT, her mother and next friend,

Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and THEODORE MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment prohibit researchers at the University of California from using racial and ethnic criteria to select subjects for bona fide research studies regarding primary school education?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. INTRODUCTION 6

II. UES'S ADMISSIONS PROCESS SERVES A COMPELLING GOVERNMENT INTEREST 8

A. This Court's Decisions Strongly Support The Ninth Circuit's Holding That Research On Improvements In Early Education Is A Compelling State Interest 8

1. This Court has Frequently Held that the State's Interests in Both Education and Research Are Compelling 8

2. Educational Research Is a Specific Governmental Interest Which the Ninth Circuit's Decision Makes Clear Cannot Be Used to Justify Race-Based Decision-Making beyond the Narrow Facts of this Case 11

3. This Court's Strict Scrutiny Decisions Make Clear that Remedying Past Discrimination Is Not the Only Compelling Governmental Interest 12

B. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals 16

C. The Court Of Appeals Did Not Base Its Opinion On An "Assumption" Of The Validity Of Racial Stereotypes 21

TABLE OF CONTENTS – Continued

Page

III. UES'S USE OF RACIAL SELECTION CRITERIA IS NARROWLY TAILORED TO ACHIEVE ITS RESEARCH GOALS 23

A. The Ninth Circuit's Holding That The UES Admissions Process Is Narrowly Tailored To Promote Its Research Goals Was Based On The Factual Findings Of The District Court..... 23

B. The District Court Properly Found, And The Ninth Circuit Properly Affirmed, That None Of The Alternatives Proposed By Petitioner Would Meet UES's Research Needs..... 25

C. The Ninth Circuit Applied The Appropriate Standard Of Review 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 13, 14, 15, 16, 17, 18

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 18

Ambach v. Norwick, 441 U.S. 68 (1979) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 8

Bush v. Vera, 517 U.S. 952 (1996) 15

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 12, 13, 14, 15, 16

Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia, 91 F.3d 586 (3d Cir. 1996) 19

Daubert v. Merrell Dow, 509 U.S. 579 (1993) 23

Hopwood v. State of Tex., 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 20, 21

In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994) 18

Keyishian v. Board of Regents, 385 U.S. 589 (1966) 9, 22

Miller v. Johnson, 515 U.S. 900 (1995) 15

Myer v. Nebraska, 262 U.S. 390 (1923) 8

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 16

New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940 (1st Cir. 1988) 8

O'Donnell Construction Co. v. District of Columbia, 936 F.2d 420 (D.C. Cir. 1992) 18

TABLE OF AUTHORITIES – Continued

Page

Plyler v. Doe, 457 U.S. 202 (1982) 8

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) 18

Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159 (5th Cir. 1996) 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 7, 28

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 9

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 29

Shaw v. Hunt, 517 U.S. 899 (1996) 15

Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989) 16

Sweezy v. New Hampshire, 354 U.S. 234 (1957).. 9, 22, 29

Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1547 (D.C. Cir. 1996) 19

Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999) 20

United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) 18

University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) 29

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8

Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) 17

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11, 12, 15

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1983 2

42 U.S.C. § 2000d 2

RULES

Fed. R. Civ. Proc. 52(a) 7, 24, 25, 28

Supreme Court Rule 10 7

Rule 10(a) 21

STATEMENT OF THE CASE

The Corinne A. Seeds University Elementary School ("UES") is a laboratory school operated by the Graduate School of Education and Information Studies ("GSEIS") at the University of California, Los Angeles. Petition, Appendix ("App.") C:1. UES, which is not associated with any elementary public school system, is a unique institution with a unique mission:

> UES's primary mission is as a program associated with the UCLA GSE&IS is to conduct research and disseminate information regarding potential innovations in urban elementary education methods.

App. C:22-23. The 460 students enrolled at UES in pre-kindergarten through sixth grade are research subjects and are covered by all federal, state and university regulations regarding treatment of human subjects. App. C:3, 5.

Students at UES participate in a broad array of important scholarly research into the problems and challenges confronting urban education. As the district court commented, "[t]he Court simply cannot hope to recount each of the particular innovative educational techniques developed at UES, or each of the specific studies conducted at UES, which rely on the diversity of the laboratory school's student population." App. C:24. As examples, the court cited several studies regarding mathematics instruction methods, the effects of California's implementation of a mathematics curriculum, bilingual education and peer leadership. *Id.* at C:24-25, fn. 25.

In order to obtain a scientifically valid research population for these studies, UES selects students on the basis of a number of criteria, primarily socioeconomic background, gender, primary language and race. See App.

C:5-6. Within these criteria, applicants are selected randomly; there are no achievement/ability tests or competitive criteria on which applicants are ranked. *Ibid.* The sole purpose of UES's use of race as a selection criterion is to maintain the scientific validity and credibility of its research. App. C:5.

Petitioner, Keeley Tatsuyo Hunter is a female minor who states her ethnic identity as one-quarter Asian and three-quarters Caucasian. App. C:2. In December 1994, when she was four years old, petitioner's parents submitted an application for her admission to UES's Early Childhood (pre-kindergarten) program for the following fall. Petitioner, who was one of 215 applicants for 46 spaces, was not selected. App. C:4. Petitioner's mother then brought this suit on her behalf, naming as defendants The Regents of the University of California and Theodore Mitchell, then the Dean of GSEIS.[1] After early motions, two claims survived for trial: a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, against The Regents, and a claim for prospective injunctive relief under 28 U.S.C. § 1983 against Dr. Mitchell.[2] Both claims were based on the contention that use of race and ethnicity as part of the criteria for selecting students to attend UES violated Petitioner's statutory and constitutional rights.[3]

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[1] Petitioner's older sister attended UES. Before petitioner was denied admission, her mother had vigorously defended UES's admissions criteria. App. C:30-31.

[2] Petitioner does not challenge the district court's pre-trial rulings on appeal. In addition, petitioner does not pursue her Title VI claim (the only claim asserted against The Regents of the University of California) in this Petition. See Petition at i, 2.

[3] In light of the strict standard of review applicable to UES's racial classification, at the outset of the case, the district

The district court conducted a two-day bench trial on these remaining claims to determine whether the use of race/ethnicity in the UES admissions process is narrowly tailored to serve a compelling state interest. At the trial, defendants presented the testimony of numerous educational experts and researchers regarding the nature and importance of the research activities conducted at UES. App. C:24-25 & fn. 24, 25, 26.

In addition, substantial evidence from educational experts demonstrated that an ethnically diverse study population is required, both by the nature of the specific research conducted at UES and by the nature of education research generally, to produce scientifically valid results and to disseminate those results effectively to practitioners. App. C:25 & fn. 26. Many of the studies conducted at UES seek to investigate the role, if any, of race in educational outcomes. As examples, the district court identified research on the educational impacts of "limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children." App. C:24. Study of, for example, the potential effect of racial and ethnic conflict in the classroom requires a racially diverse subject population. In addition, the scientific validity even of studies that do not directly seek answers to questions about the role of race require subject populations that are representative of the characteristics, including racial characteristics, of the populations to which their results would be

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court granted petitioner's application for a preliminary injunction requiring her admission to the 1995-96 EC-1 class. It is noteworthy that, despite the court's appropriate initial skepticism, after hearing all of the evidence at trial the court became convinced of the legality of the UES admissions process.

applied. See App. A:9. Because past research has indeed found that ethnicity can be correlated to response to educational approaches, App. A:31 fn. 19, researchers must determine that their results are valid with respect to all ethnic groups as well as be able to study the reasons for those correlations. This requirement of scientific validity is particularly important because UES's research program is intended not simply to gain information for its own sake, but to develop educational strategies that can be applied to heterogeneous, multi-ethnic urban public school classrooms. Thus, the district court found that the "defendants' practical purpose of operating a laboratory school (the actual improvement of the State's urban education system) would be further jeopardized by a marked decrease in the credibility of future studies conducted at UES should the school fail to maintain a student population reflective of the urban environment." App. C:25.

Defendants also presented substantial testimony showing that scientifically valid study populations could not occur by accident: ethnic criteria must be considered in the selection of students to participate in the research conducted at UES. App. C:28. The district court found that "it would not be possible, nor would it be reasonable, to require the defendants to attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications." App. C:28.

Petitioner presented *no* witnesses to contradict any of the evidence offered by defendants on these issues. Based on these findings, the district court concluded that the UES admissions process was narrowly tailored to advance the compelling state interest of researching

improvements in urban education, and it entered judgment for the defendants.

Petitioner appealed, and a panel of the Ninth Circuit Court of Appeals affirmed. The court of appeals held that the district court's factual findings regarding the importance of scientifically valid research into the problems of urban education amply supported the conclusion that California has a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools. App. A:5.[4] The court of appeals also affirmed the district court's conclusion that a race-conscious admissions policy was necessary to obtain a scientifically valid research population, and quoted the district court's reference to "a

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[4] Petitioner's claim that the majority based its "compelling interest" holding on "the conclusory statements of two UES administrators" (Petition at 4) mischaracterizes the court's opinion. The majority noted that "[t]he district court heard extensive expert testimony on current problems in public urban education." App. A:5. The district court, in turn, cited substantial expert testimony from numerous researchers and education experts about the importance of the educational research activities conducted at UES. App. C:24-25 & fn. 24, 25, 26. *Petitioner produced no contrary evidence at trial.* Similarly, petitioner's claim that the lower courts failed to "consider whether UES's research actually improved urban education" (Petition at 4) misstates the record. For example, the district court expressly found that "strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling." App. C:26. It found that "defendants provide a strong basis in evidence that continued research will lead to greater understanding of the complex issues surrounding California's urban elementary school system – even if the defendants cannot guarantee an improvement from the results of each individual study." App. C:26-27.

parade of experts [who testified] about the necessity of a race-conscious admissions policy." App. A:8.[5]

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

As the court of appeals recognized, use of race as a criterion in selection of research subjects is an important and commonly used scientific tool. See App. A:10-11 fn. 11. The court of appeals' decision in this case stands for the narrow and unremarkable proposition that government-supported researchers can use race and ethnicity, among other factors, to select subjects for research studies on primary school education. In reaching that conclusion, the court of appeals applied settled legal principles to the specific factual circumstance of a laboratory elementary school operated by the Graduate School of Education and Information Studies at UCLA. No dispute exists about the applicable legal standard: both the district court and the court of appeals applied strict scrutiny in evaluating petitioner's Equal Protection claim. App. A:3, C:9. Thus both courts required the University to demonstrate that the UES admissions process is narrowly tailored to serve a compelling governmental interest. App. A:3-4, C:9.

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[5] Petitioner also mischaracterizes the basis of the court of appeals' "narrow tailoring" holding by suggesting that the court unquestioningly "deferred" to defendants' judgment without evaluating race-neutral alternatives proposed by petitioner. Petition at 4. On the contrary, both the court of appeals (App A:8) and the district court (App. C:26) referred to extensive expert testimony "about the necessity of a race-conscious admissions policy at UES." See, e.g., App. C:26, 28-31.

In applying this well-established standard, the court of appeals was required to consider that "[t]he district court's conclusion that UES's admissions procedures meet the strict scrutiny test is based on extensive findings of fact. . . . " App. A:4. These included findings that (i) the research into the problems of urban elementary education and their solution conducted at UES has led and will continue to lead to meaningful changes and improvements in urban primary school education, see, e.g., App. C:26; (ii) the scientific validity of that research and the ability to disseminate it effectively to practitioners requires a racially and ethnically diverse student population at UES, App. C:24-25; and (iii) achieving such a valid subject population requires the use of specific racial targets and classifications in the admissions process. App. C:28. The lower courts recited the overwhelming and largely undisputed evidence that supported these findings. See App. A:5-6, C:22-25. The court of appeals also stressed the limited factual scope of its decision and the inapplicability of its holding to different circumstances, in particular, to affirmative action programs or educational programs generally. App. A:7-8. The court of appeals properly reviewed the district court's factual findings under the "clearly erroneous" standard of Fed. R. Civ. Proc. 52(a). App. A:4; *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

In short, the court of appeals' opinion applied well-settled principles of law to well-supported factual findings in a specialized, limited factual context. This case is therefore not appropriate for review by this Court. Supreme Court Rule 10.

II. UES'S ADMISSIONS PROCESS SERVES A COMPELLING GOVERNMENT INTEREST.

A. This Court's Decisions Strongly Support The Ninth Circuit's Holding \That Research On Improvements In Early Education Is A Compelling State Interest.

1. This Court has Frequently Held that the State's Interests in Both Education and Research Are Compelling.

The district court found, and the court of appeals agreed, that "the defendants' interest in operating a research-oriented elementary school is compelling." App. A:6. The Ninth Circuit's "compelling interest" holding is not only factually unassailable, it also is in line with numerous decisions of this Court emphasizing the compelling nature of the governmental interest in both education and promoting academic research. This Court has stated that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "Providing public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). *See also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing "public schools as a most vital civic institution for the preservation of a democratic system of government"); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("Public education . . . fulfills a most fundamental obligation of government to its constituency."); *Myer v. Nebraska*, 262 U.S. 390, 400 (1923) (education is of "supreme importance"); *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940, 944 (1st Cir. 1988) (Breyer, J.) ("state's interest in making certain that its children receive an adequate secular education is 'compelling' "). The primacy of education as a government responsibility unquestionably puts the

governmental interest in improving primary education in the "compelling" category.

Similarly, this Court has often expressed the high social, and indeed constitutional, value of promoting freedom of academic research. The First Amendment to the U.S. Constitution holds a "special concern" for academic freedom. E.g., *Regents of University of California v. Bakke*, 428 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589 (1966); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). An important aspect of academic freedom is maintaining freedom of scientific inquiry and research:

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, *supra*, quoting *Sweezy*. These decisions recognize that "academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned." *Ibid*. The advancement of knowledge that results from free and open scholarly inquiry benefits society as a whole: "For society's good – if understanding be an essential need of society – inquiries into these problems [posed by the social sciences] must be left as unfettered as possible." *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

The theoretical underpinnings of *Sweezy* and *Keyishian* – that the current state of knowledge is fallible and

that scholarly research in the social sciences can produce tangible benefits for society – was powerfully borne out by the district court's factual findings:

> [T]he Court concludes that strong evidence exists that the research performed at UCLA will help effectuate meaningful change in urban elementary schooling. During trial the Court heard from a parade of experts about the necessity of a race-conscious admissions policy at UES. Each expert's testimony was underscored by the belief that the State must "continue to conduct research on issues involving how children learn and how we can do a better job of teaching them." Handler Direct, ¶ 3, at 3:5-7. Given the nature of problems currently plaguing the urban public school system, especially in the Los Angeles Unified School District, it would be presumptuous to assume that the State already possessed the answers to all of the complex questions about teaching and learning methods. *Id.* at 3:13-26. As the only publicly-funded laboratory school in California, UES plays an integral part in the State's search for ways to improve the quality of urban education.

App. C:26. These findings thus expressly linked the two compelling interests of education and scholarly research. The district court further found, based on extensive expert testimony, that, "without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost." App. C:25.

In short, this Court's precedents demonstrate that both education and advancement of knowledge through scientific research are compelling governmental interests. The factual findings of the district court, affirmed by the Ninth Circuit, demonstrate that California does indeed have a compelling interest in the research conducted at UES.

2. Educational Research Is a Specific Governmental Interest Which the Ninth Circuit's Decision Makes Clear Cannot Be Used to Justify Race-Based Decision-Making beyond the Narrow Facts of this Case.

Petitioner asserts that the Ninth Circuit's opinion "conflicts" with *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), because those cases held that certain proposed state interests (the "role model" theory in *Wygant* and the "societal discrimination" theory in *Croson*) were too "amorphous" to be "compelling" under strict scrutiny analysis. Petition at 8. Petitioner claims that the interest in educational research violates this rule because it "could easily 'justify race-based decision-making essentially limitless in scope and duration.' " *Ibid* (quoting *Croson*, 488 U.S. at 498 (plurality opinion)). Petitioner's argument ignores the pains taken by the Ninth Circuit to stress the narrow, fact-bound nature of its holding.

Throughout its opinion, the court of appeals emphasized the uniqueness of the factual context. It began by framing the issue narrowly as "about an elementary school operated as a research laboratory by UCLA's [GSEIS]." App. A:2. It rejected the possibility, suggested by the dissent and repeated by petitioner, that its opinion might be applied broadly to other educational settings by the mere designation of a school as a research enterprise or a mere statement of a research purpose. "It is not UES's *designation* as a laboratory school that justifies its admission process." App. A:7. "[A] mere statement from a governmental entity that it is committed to research, without more, would not be sufficient to establish a compelling interest." App. A:8. Rather, the court emphasized

the unusual and bona fide nature of UES's research mission and activities, the extensive amount of research that really does take place there, the substantial commitment of resources to research, and the impressive number of research personnel working at UES. App. A:7-8.[6] The court concluded that "[a]ll of these characteristics make UES an *exceptional* school and a valuable resource to California's public education system." App. A:8 (emphasis added).

The contrast between the interest approved by the Ninth Circuit here and the interests rejected by this Court in *Wygant* and *Croson* is obvious. Both the "role model" and "societal discrimination" interests were virtually a blank check for application of racial classifications in all governmental activity. In contrast, the Ninth Circuit's holding is expressly limited to the narrow context of a bona fide, University-run research school with the same characteristics as UES.

3. This Court's Strict Scrutiny Decisions Make Clear that Remedying Past Discrimination Is Not the Only Compelling Governmental Interest.

Petitioner's primary argument, here as below, is her inaccurate claim that this Court has held that remediation of past discrimination is the *only* government interest that can support racial classifications. On its face this notion is illogical, suggesting that this Court has held, as a matter of law, that remedying past discrimination, as important as it may be, is always the most compelling possible

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[6] The evidence of the bona fide nature of UES's research mission and activities is overwhelming, App. C:24, and petitioner has never contested it.

national goal, above maintenance of domestic order, protection of public health and welfare or providing a national defense, no matter what the circumstances.[7] Petitioner's view is also inconsistent with the essential character of strict scrutiny review, which this Court has emphasized is not a rigid, mechanical test. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995), the Court emphasized that strict scrutiny is *not* "strict in theory, but fatal in fact," and that it does *not* "treat

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[7] As a belated recognition of the implausibility of the claim that no other governmental interest could rise to be as "compelling" as remedying past discrimination, petitioner attempts to incorporate Justice Scalia's concurrence in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521, *supra*, (Scalia, J., concurring in result), to broaden the permissible scope of "compelling" interests to include "a social emergency rising to the level of imminent danger to life and limb." Petition at 7. This attempt to add plausibility to petitioner's argument totally undermines it. Petitioner's contention is based on a rigid reading of the *Croson* plurality opinion in which, it is claimed, the plurality held that racial classifications must be "strictly reserved for remedial settings" in all contexts. Petition at 7, quoting *Croson*, 488 U.S. at 493. The language relied upon, if read as petitioner urges, includes no room for exceptions, such as "imminent danger of life and limb." Thus, Petitioner's expansion of possible "compelling" interests to include "imminent danger" recognizes that her reading of *Croson* is wrong: racial classifications are *not* to be reserved only for remedial settings. Petitioner's citation to Justice Scalia's concurrence is doubly ironic because the point of the passage quoted is that remedying past discrimination is *not*, in Justice Scalia's opinion, a permissible ground for States to classify individuals on the basis of race. *Id.* at 521-23. Finally, it is important to recognize that, like the *Croson* plurality opinion, Justice Scalia's concurrence was in the context of a contracting affirmative action case, and cannot be read broadly to apply to all contexts not before him.

dissimilar race-based decisions as though they were equally objectionable."

> "[S]trict scrutiny *does* take 'relevant differences' into account – indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision-making."

Id. at 228 (original emphasis). Thus, this Court has explained that the outcome of strict scrutiny review depends on context and the evidence presented in each case.

Petitioner's contrary claim that strict scrutiny allows but one "compelling interest" is based entirely on cobbling together bits and pieces of language from various equal protection opinions, while ignoring the cases' holdings and context. This semantic exercise is possible only because during the past 25 years nearly all cases applying the Equal Protection Clause to racial classifications have involved challenges to affirmative action programs. In those cases, the Court has rejected non-remedial justifications and has been required to analyze closely whether justifications claimed to be remedial truly were. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 *supra*. But this line of cases has simply not considered what government interests might be "compelling" in other non-affirmative action situations.

The primary example of petitioner's method of argument is where she plucks, out of context, language from Justice O'Connor's plurality opinion in *Croson*, 488 U.S. at 493: "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of

racial inferiority and lead to politics of racial hostility." Petitioner nonsensically claims that the plurality in this passage intended to reject all possible non-remedial justifications in all possible contexts, even though none of those justifications or contexts was before the Court.[8] In fact, Justice O'Connor was writing in reaction to a minority contractors set-aside program that was labeled "remedial" but which was justified by reference to generalized, historic, societal discrimination. Her warning must be considered in that context, as Justice O'Connor herself explained writing for the Court in *Adarand*, 515 U.S. at 228 ("Strict scrutiny does not 'trea[t] dissimilar racebased decisions as though they were equally objectionable.").[9] In the present context, for example, there is little reason

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[8] The claim that Justice O'Connor meant to suggest that no non-remedial interest could ever justify a racial classification is particularly unlikely since, just three years earlier, she recognized that "[a]dditionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use for racial considerations in furthering that interest." *Wygant v. Jackson*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring). And, seven years after *Croson*, Justice O'Connor wrote that the States "have a compelling interest" in attempting to comply voluntarily with the anti-dilution provisions of section 2(b) of the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring).

[9] Subsequent decisions of this Court show that it did not intend *Croson* to reject any non-remedial interests, even ones that were not raised there. In *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) and *Miller v. Johnson*, 515 U.S. 900, 921 (1995), this Court left open the question whether a specific non-remedial interest (compliance with the Voting Rights Act) could justify race-based classifications. This reservation would have been unnecessary had this Court already held in *Croson* that *no* non-remedial interests are "compelling," as petitioner contends.

to believe that racial selection of study participants for research purposes in a non-merit based process will "lead to notions of racial inferiority," nor would it be likely to "lead to politics of racial hostility" that the *Croson* plurality feared in the context of racial contracting preferences. Strict scrutiny requires that such differing contexts be taken into account. As Justice O'Connor's *Adarand* opinion instructs (see above), arbitrarily limiting "compelling" governmental interests to a single category, regardless of context, is inconsistent with the rationale of strict scrutiny.

Furthermore, in other areas of constitutional analysis, such as under the First and Fourth Amendments, where "strict scrutiny" review is also employed to protect individual rights, this Court has recognized a variety of governmental interests as "compelling," e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ("Government has a compelling interest in ensuring that front-line [drug] interdiction personnel are physically fit, and have unimpeachable integrity and judgment."); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 628 (1989) (state interest in avoiding railroad accidents is "compelling."). This Court has simply never expressed the sort of absolutist view of compelling interests that petitioner advances.

B. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals.

The Ninth Circuit's holding that educational research is a compelling interest does not, as petitioner claims (Petition at 9), conflict with other circuits' decisions for the simple reason that no other circuit has addressed the

issue. Once again, petitioner's method is to pluck language from various court of appeals decisions entirely divorced from its context (usually a challenge to claimed remedial affirmative action programs), and to contend that statements meant to reject a particular non-remedial interest in a particular circumstance apply to all non-remedial interests in all circumstances. As Judge Posner wrote for the Seventh Circuit in *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (holding that racial considerations may be applied to prison staff hiring), such statements do not create a meaningful "conflict":

> [T]here is a reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for the discrimination and expressed that rejection in the sweeping dicta that we have mentioned. The weight of judicial language depends on context, by these plaintiffs ignored.

Petitioner's interpretation of these court of appeals decisions – as rigidly holding that only a remedial interest is compelling under any and all circumstances – should also be rejected because it would put them in sharp conflict with the very essence of the strict scrutiny standard described in *Adarand*. Such an inflexible rule developed in one context and applied to all others is the

opposite of "tak[ing] 'relevant differences into account,' " which this Court has described as the "fundamental purpose" of strict scrutiny. *Adarand*, 515 U.S. at 228.

In any event, none of the court of appeals decisions petitioner cites in fact claims to impose uniform limits on compelling interests applicable to all circumstances:

- Far from holding that only remedial interests could be compelling, the Fourth Circuit in *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992), recognized that a non-remedial rationale (student diversity) might be compelling, but held that it had not been shown to justify the particular racially restrictive scholarship program at issue there. *Id.* at 56, fn. 4.
- In *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), the Sixth Circuit did not purport to dismiss all non-remedial governmental interests; rather, it held that, where a remedial interest is offered, it cannot be based on "societal discrimination alone," but must be supported by "evidence of prior discrimination by the governmental entity involved." *Id.* at 1162-63.[10]
- The language petitioner extracts from both *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1544 (11th Cir. 1994), and *O'Donnell Construction Co. v. District of Columbia*, 936 F.2d 420, 424 (D.C. Cir. 1992), also involves only the manner in

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[10] Furthermore, since *Aiken*, the Sixth Circuit has expressly held that non-remedial interests may support racial classifications. *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998) (holding that "creating a jury pool that represents a fair cross section of the community is a compelling governmental interest," but rejecting the particular plan at issue as not narrowly tailored).

which courts must analyze governmental interests that are claimed to be remedial in the context of minority contractor preferences, and does not address non-remedial interests that might or might not support racial classifications in entirely different circumstances.

- The Third Circuit in *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), far from announcing a general rule of universal application, prefaced the very passage quoted in the Petition (at 12) by noting the specific context: "[t]he current law of the land *concerning the Equal Protection Clause and municipal, race-based, affirmative action programs* is set forth in [*Croson*]." *Id.* at 596.
- Similarly, the D.C. Circuit in *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (D.C. Cir. 1996), in a passage not fully quoted by petitioner, stated that the defendant had conceded that "there is no caselaw approving [promotion of racial diversity among teachers 'for education's sake'] *to support an affirmative action plan under Title VII.*" *Id.* at 1558.
- The Petition's quotation of *Police Ass'n of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1168 (5th Cir. 1996), similarly deletes the important contextual limitation in the Fifth Circuit's opinion. Far from holding, as petitioner suggests, that *all* "racial classifications 'must be narrowly tailored to remedy past specific instances of discrimination' " (Petition at 10), the full quotation from the opinion is that "*an affirmative action plan* must be narrowly tailored to remedy past specific

instances of discrimination." *Ibid.* (emphasis added).

- Petitioner's citation to *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), is particularly misleading, since in that case the court explicitly *assumed* that the non-remedial goal of diversity in education was "compelling" but found that the racial preference scheme at issue there was not narrowly tailored to meet that goal. *Id.* at 705.

None of these cases purported to reject non-remedial interests in circumstances not before the courts, and none presents a conflict with the Ninth Circuit's decision here.

This leaves the Fifth Circuit's decision in *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), which involved a challenge to the University of Texas Law School's use of affirmative action in admissions. In *Hopwood*, the Fifth Circuit rejected Texas's claim that the goal of "obtaining the educational benefits that flow from a racially and ethnically diverse student body," *id.* at 938, constituted a compelling state interest. *Id.* at 944-96. The actual *holding* of *Hopwood* did not go beyond rejection of the diversity rationale in an affirmative action context. Nevertheless, in analyzing the question, the Fifth Circuit stated that:

> "the [Supreme] Court *appears* to have decided that there is *essentially* only one compelling state interest to justify racial classifications: remedying past wrongs."

Id. at 944 (emphasis added). *Hopwood* does not present a conflict with the Ninth Circuit decision in this case that justifies *certiorari* review. First, even on its own terms, *Hopwood's* supposed rejection of non-remedial interests was neither definitive nor absolute ("appears," "essentially"). Second, *Hopwood* did not hold, because it did not consider, that the interest in operation of a research-

oriented elementary school was not compelling. To the extent *Hopwood's* speculation about this Court's Equal Protection holdings can be read to extend beyond the affirmative action context, it is necessarily *dictum*.

C. The Court Of Appeals Did Not Base Its Opinion On An "Assumption" Of The Validity Of Racial Stereotypes.

Petitioner's claim that the Ninth Circuit based its decision on assumptions of the validity of racial stereotypes fundamentally misconstrues both the court's decision and the method of science. In fact, the Ninth Circuit did not, as the Constitution does not, assume the answer to any scientific question. On the contrary, its decision is based on the importance of allowing scientists the tools necessary to obtain a better understanding of issues regarding the education of our youngest citizens.

Petitioner seizes on the words "different learning styles" to suggest that the court of appeals' decision depends on the "assumption" that there is a racial difference in "learning styles." Reading the passage in context reveals how remarkably petitioner misunderstands – indeed, virtually inverts – the court of appeals' reasoning. The Ninth Circuit was, in fact, quoting the district court's "unexhaustive list" of the issues and challenges facing urban education that are studied at UES. This list included "limited language proficiency, different learning styles,[11] involvement of parents from diverse cultures with different expectations and values, and racial and

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[11] Neither the court of appeals nor the district court stated that the "different learning styles" it referred to were race-based. Petitioner *assumes* that the courts were referring to the possibility of a racial difference in learning styles.

ethnic conflict among families and children." App. C:24. These are not *assumptions* on which UES's research is based, but *questions* it seeks to answer through research. As the district court found, by selecting a racially and ethnically diverse student population, UES creates the conditions necessary to study these and other issues, but consistent with the method of science it does not "assume" what the answers to those questions will be.

Indeed, it is *petitioner* who seeks to impose assumptions about the role, or lack of role, of race in education, assumptions that she contends must be accepted by government-sponsored science. Petitioner would impose a politically-correct orthodoxy that bars publicly-funded researchers from studying questions of race and racial difference, because, she claims, the Constitution effectively does not allow some questions to be asked. In petitioner's view, the Constitution requires scientists, at least those supported by government funding, to conclude that race and ethnicity are not correlated to educational outcomes.[12] On the contrary, the Constitution rejects rather than imposes a "pall of orthodoxy" over academic inquiry. *Keyishian*, 385 U.S. at 603. It does not, as petitioner claims, compel scholars to assume that race and ethnicity do not influence primary education; rather, it allows and encourages them to study such scientific questions. *See ibid; Sweezy v. New Hampshire*, 385 U.S. at 250-51. "The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be

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[12] Since there is scientific evidence that race *is* correlated with educational outcomes, App. A:31 fn. 18, presumably petitioner's view of the Constitution requires that this evidence be ignored, even at the cost of producing false results.

so, and that in itself is an advance." *Daubert v. Merrell Dow*, 509 U.S. 579, 597 (1993). Petitioner's argument regarding "assumptions" on which the Ninth Circuit's decision is based is a straw man that provides no basis for certiorari review.

III. UES'S USE OF RACIAL SELECTION CRITERIA IS NARROWLY TAILORED TO ACHIEVE ITS RESEARCH GOALS.

The Petition's attack on the Ninth Circuit's "narrow tailoring" holding, like its challenge to the "compelling interest" holding, is an attempt to recharacterize a relatively narrow, fact-bound issue as a broad legal dispute appropriate for this Court's review.

A. The Ninth Circuit's Holding That The UES Admissions Process Is Narrowly Tailored To Promote Its Research Goals Was Based On The Factual Findings Of The District Court.

Petitioner's challenge to the court of appeals' "narrow tailoring" holding ignores the intensely factual nature of that decision. Both the district court's and the Ninth Circuit's narrow tailoring holdings were based, not on some broad legal conclusions, but on the finding, based on substantial evidence, that *in this case* the alternatives to racial admissions targets proposed by plaintiff at trial would not, in fact, result in the conditions necessary to conduct research at UES. As the Ninth Circuit framed the issue at the beginning of its discussion, "the question was whether the district court correctly concluded that '[t]he defendants have successfully proven that the use of racial and ethnic identity criteria in UES's admissions policy is *narrowly tailored* to serve the purpose of a compelling state interest.' " App. A:8. The Ninth Circuit's

opinion focuses on the factual finding of the district court that, indeed, a race-conscious admissions policy was necessary to perform important research at UES. The court of appeals quoted the district court's reference to "a parade of experts [who testified] about the necessity of a race-conscious admissions policy at UES." App. A:8. It gave specific examples of expert testimony describing the reasons race must be used explicitly to select students in order to obtain the proper subject population for research. App. A:9. And it concluded that *"[b]ased on the evidence in the record,* we agree with the district court's determination that UES's use of race/ethnicity in its admissions process is narrowly tailored to achieve the necessary laboratory environment." App. A:11 (emphasis added).

Given the factual nature of the district court's narrow tailoring finding, the Ninth Circuit was, and this Court is, required to afford it substantial deference. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. Proc. 52(a). Applying this standard, there is utterly no basis to disturb the district court's finding. In response to the extensive evidence referred to by both courts on the need for race-based selection, *petitioner offered no contrary evidence at trial,* but was content merely to cross-examine defendants' witnesses, hoping to shake their credibility. The district court's finding that the University's witnesses were credible is neither subject to challenge on appeal nor an appropriate issue for this Court's review.[13]

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[13] Ignoring the review standard applicable to the district court's fact-finding, petitioner attempts to dismiss the evidence

B. The District Court Properly Found, And The Ninth Circuit Properly Affirmed, That None Of The Alternatives Proposed By Petitioner Would Meet UES's Research Needs.

As discussed above, the district court found, as a factual matter and based on uncontroverted evidence, that a racially diverse subject population is necessary for the important research taking place at UES. App. C:24-25. The court also found that it would not be possible for defendants to achieve this racial diversity without the use of specific racial targets and classifications. App. C:28. In addition to arguing with the extensive and uncontroverted evidence on which the district court relied for these findings, petitioner here, as she did at trial, see App. C:27, claims that the UES admissions process is not narrowly tailored because hypothetical, supposedly

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from a "parade of experts" on which the court relied by noting that two of the three experts referred to by way of example in the Ninth Circuit's opinion were University employees and by labeling their testimony "conclusory." Petition at 23-24. But it is for the district court to determine the credibility of the University employees as witnesses. Fed. R. Civ. Proc. 52(a). Furthermore, even in the brief excerpts from much more extensive testimony quoted by the court of appeals, the University's witnesses did not merely offer "conclusions" of the need for explicit racial admissions criteria, but provided specific reasons for their opinions that alternatives could not achieve UES's objectives. See, e.g., App. A:9 (quoting testimony of Dr. Howes that scientific validity requires direct use of variables at issue in selection and that small sample size requires explicit consideration of race to achieve proper subject populations and quoting Dr. Stipek that random selection could not obtain a population that balances race with all other necessary characteristics).

"race-neutral" alternatives might achieve the same goals.[14]

At trial, petitioner merely hypothesized a series of potential alternatives without *any* evidentiary showing that her alternatives would meet UES's need for ethnic diversity or the other requirements of its research program. The district court addressed these alternatives at length, and, based on the testimony of the University's many experts, concluded that none would meet UES's research needs. App. C:27-32.[15] The district court found

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[14] The supposed "race-neutrality" of these alternatives – which involve such suggestions as relocating UES to a more ethnically diverse neighborhood or mandating laboratory conditions in public schools throughout California – is in any event illusory. Given the need for a racially diverse study population, petitioner's alternatives are merely attempts to reduce the *appearance* of race-based decision-making while achieving the same pre-determined, required student racial profile. Decisions such as where to relocate the school or in which public schools to establish laboratory conditions would have to be made based on the *race* of the resulting student body; otherwise they would *not* achieve UES's research objective for a racially diverse subject population. Choosing an entire school on the basis of its existing racial composition would effectively deny the benefits of the laboratory program to all other students on the basis of race. Such decisions would be every bit as much race-based as UES's current admissions process. No constitutional value is advanced by such attempts merely to conceal the race-based nature of the subject selection process.

[15] For this reason the lower courts' decisions here do not conflict with the decisions of other circuits, as petitioner claims. Petition at 22-26. All of the decisions petitioner cites were fact-based determinations that, on the evidence presented in those cases, the challenged racial classifications were not narrowly tailored to achieve the compelling interest at issue. In contrast, here, after a searching inquiry and based on the substantial evidence presented at trial, the district court found, and the

generally that, by seeking to disguise the racial nature of subject selection by substituting "markers" (such as location or socioeconomic status) for race, such alternatives would undermine the scientific validity of the research. The court cited one expert who testified:

> There is a simple rule about being a researcher. You ask a simple question. If you're trying to find a sample that has some distribution of race, you use race as the variable to make that. You don't use an 'approximation' or some variable of it.

App. C:28. In addition, the district court found, based on the evidence presented at trial, that other methods would not be able to ensure the sample student population required for UES's research activities, App. C:28-29, and that the type of research activities conducted at UES could not be performed at another school, such as a public school, not dedicated to research. App. C:31. The lower courts' rejection of petitioner's "alternatives" was based on substantial evidence presented at trial and is not a matter appropriate for this Court's review.[16]

Ninth Circuit affirmed, that the University *had* demonstrated that in *these* circumstances its admissions process was narrowly tailored to advance the specific compelling interest of researching improvements in urban education. The fact that other circuits reached different results on different facts in entirely different contexts does not constitute a "conflict" requiring this Court's review.

[16] Petitioner also inaccurately contends that the lower courts' decisions conflict with decisions of other circuits by failing to require that the University has considered alternative means of achieving needed racial diversity before it implemented racial classifications. Petition at 26-27. First, as the district court found, UES *did* consider various alternatives and found that they did not achieve the necessary study

C. The Ninth Circuit Applied The Appropriate Standard Of Review.

Petitioner's complaint that the Ninth Circuit applied a "deferential" standard of review to the narrow tailoring issue mischaracterizes both the law and the court's decision. First, it is quite clear that the Ninth Circuit, as had the district court, applied the very non-deferential standard of strict scrutiny to its overall review of the UES admissions process. App. A:3-4. Petitioner's claim that the Ninth Circuit applied a "deferential" standard is based on the court's statement, in the context of reviewing the district court's factual finding that petitioner's (and the dissent's) hypothetical alternatives could not achieve a subject pool with the necessary ethnic characteristics, that "courts should defer to researchers' decisions about what they need for their research." App. A:10-11.

First, as noted above, the Ninth Circuit was *required* to apply a deferential standard of review to these factual findings. Fed. R. Civ. Proc. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 287.

Second, the reference in the court of appeals' opinion on which petitioner seizes was simply a recognition by the court that, in light of the one-sided, indeed *uncontroverted*, nature of the evidence regarding the subject population necessary at UES and the means necessary to attain it, the court should not impose its own, non-expert view of how to conduct valid scientific research. The

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populations. App. C:28 (minority outreach), 30-31 (relocation). Furthermore, the court also found that many of plaintiffs' proposed alternatives were inherently unable to achieve UES's research goals. E.g., App. C:31 (not possible to conduct effective research in public schools).

court of appeals did no more than echo the oft-stated reticence of this Court to substitute its opinion on matters of the conduct of science for those of scientists. In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990), this Court repeated its caution that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." Quoting *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring) (academic inquiries "must be left as unfettered as possible").[17] In making this comment, the Ninth Circuit referred to examples of the many types of scientific research in which, like the research conducted at UES, ethnic criteria are essential in selecting subject populations. App. A:10-11 fn. 11. The court was rightfully concerned about issuing uninformed pronouncements regarding the need for such protocols that would undermine the ability of scientists to conduct valuable research.

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[17] Petitioner (Petition at 21-22) criticizes the Ninth Circuit's citation to *University of Pennsylvania v. EEOC* on the ground that in that case this Court noted that, because the University of Pennsylvania did not contend that race, sex and national origin constituted "academic grounds" on which to make faculty promotion decisions, an attempt by the University to withhold certain documents from the EEOC during an investigation of alleged Title VII violations was too remote from a genuine academic decision to warrant such deference. See 493 U.S. at 198-99 & fn. 7. In contrast, here, as extensive evidence in the record demonstrates, the decision about the race, sex and national origin of subjects to include in a study of urban education is centrally an academic judgment which the courts should be most reluctant to second-guess.

The Ninth Circuit did not suggest that the assertions of scientists about their research needs should be uncritically accepted by the courts nor that the stated needs of researchers trumped all constitutional limitations. On the contrary, both the district court and Ninth Circuit engaged in a searching review of the justifications for race-based selection put forward by the University.[18] The Ninth Circuit merely recognized that where, as here, testimony regarding the needs of scientific research is strong and undisputed, courts do not have the scientific expertise to disregard it and to impose their own view of what researchers need to conduct their investigations. Nothing about that observation warrants review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: August 18, 2000

Respectfully submitted,

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[18] See, e.g., App. A:7-8 (looking beyond UES's *designation* as a laboratory school and its *stated mission* of educational research and examining closely the bona fide nature of UES's research activities).